A

SILVER CORRIDOR SDN BHD v. GALLANT ACRES SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
MOHAMAD ARIFF YUSOF JCA
B VARGHESE GEORGE JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-2303-10-2013]
1 SEPTEMBER 2015

C ***CONTRACT:*** *Agreement – Sale and purchase agreement – Allegation that company had paid purchase price to wound up company under sale and purchase agreements – Whether allegation backed by evidence – Whether sale and purchase agreements valid – Whether sale and purchase agreements a sham and an attempt to fraudulently exclude properties from being considered as part of assets – Whether burden to nullify sale and purchase agreements discharged*

D ***COMPANY LAW:*** *Winding up – Proof of debts – Appointment of liquidator upon winding up of company – Discovery of sale and purchase agreements – Allegation that company had paid purchase price to wound up company under sale and purchase agreements – Whether allegations substantiated – Whether sales and purchase agreements valid – Whether s. 293 of Companies Act 1965 must be read* E *with ss. 52 or 53 of Bankruptcy Act 1967*

The second respondent ('Kepong Development') was the registered owner of a land ('the land') while the first respondent ('Gallant Acres') was a developer. Gallant Acres was wound up and a liquidator was appointed. During the course of verification exercise undertaken by the liquidator, the F appellant ('Silver Corridor') produced 12 sale and purchase agreements ('the 12 SPAs') for 12 shops constructed or to be constructed. Silver Corridor claimed that it had paid RM1,440,000 to Gallant Acres, being the total purchase price set out in the 12 SPAs. However, the liquidator could not find any evidence that the alleged payments were made. Gallant Acres and G Kepong Development commenced an action at the High Court, seeking to declare the 12 SPAs invalid, void and of no effect pursuant to s. 293 of the Companies Act 1965 ('CA') read together with ss. 52 and/or 53 of the Bankruptcy Act 1967 ('BA'). It was contended that the 12 SPAs were an attempt by the then directors of Gallant Acres and Silver Corridor to H fraudulently exclude the 12 shops from being considered as part of Gallant Acres' assets. The High Court Judge held in favour of Gallant Acres and declared the 12 SPAs void. Hence, the present appeal. The parties disputed over, *inter alia*, the provision to be read with s. 293 of the CA. Silver Corridor submitted that s. 293 of the CA must be read with s. 53 of the BA I while Gallant Acres and Kepong Development argued that s. 293 of the CA ought to be read with s. 52 of the BA.

Held (dismissing appeal)
Per Varghese George JCA delivering the judgment of the court:

(1) In the case of a company under liquidation, s. 293 of the CA had to be read either with ss. 52 or 53 of the BA to determine whether certain transactions, disposals or payments involving the assets of the company were void or voidable for the reason that it constituted an 'undue preference' as against the assets or creditors of the company concerned. Section 52 of the BA is the applicable provision when the challenge was premised on the grounds that the disputed transaction was not entered *bona fide* and/or for valuable consideration. Section 53 of the BA would only be relevant in a situation where the bankrupt (company) is already insolvent and the challenge is to invalidate certain disposals or payments effected to some creditors or beneficiaries, in preference to others or the general body of creditors. (paras 22 & 30)

(2) By seeking to read s. 293 of the CA with s. 53 of the BA, Silver Corridor was attempting to restrict the so termed 'twilight period' to six months as opposed to a period of two years prior to the presentation of the winding-up petition allowed under s. 52 of the BA. This was a desperate stance to confuse the real issues before the court. Section 53(1) of the BA was only relevant when considering whether disposals or payments made in favour of a 'creditor' were being challenged to be in preference to other 'creditors', that is in the run-up to a bankruptcy. (paras 26 & 29)

(3) What had been pleaded by Gallant Acres and Kepong Development in this action and which had been accordingly pursued at the trial was that the disputed transactions, namely the 12 SPAs, had not been entered in good faith and nor were they supported by valuable consideration passing from Silver Corridor to Gallant Acres. This obviously meant that s. 52 of the BA was the material provision to be invoked to be read with s. 293 of the CA. (para 27)

(4) Gallant Acres had discharged the burden to prove that the sale and purchase transactions of the 12 shops were not undertaken in good faith and/or for valuable consideration and was therefore void pursuant to s. 293 of the CA read with s. 52 of the BA. There was no error or misdirection by the High Court Judge that there was an underlying deceitful intent or motive behind the execution of the 12 SPAs. (paras 32 & 33)

(5) There was no evidence that the purported sum of RM1,440,00, being the stated purchase consideration under the 12 SPAs had indeed been paid into a proper house development account of Gallant Acres. The enquiries by the liquidator as to the existence or operation of such a HDA directed to the Directors of Gallant Acres in offices at the material times, remained unanswered. (para 34)

A ***Bahasa Malaysia*** *translation of headnotes*

Responden kedua ('Kepong Development') adalah pemilik tanah berdaftar ('tanah') manakala responden pertama ('Gallant Acres') adalah pemaju. Gallant Acres telah digulungkan dan seorang pelikuidasi dilantik. Semasa proses pengujian dijalankan oleh pelikuidasi, perayu ('Silver Corridor') B mengemukakan 12 perjanjian jual beli ('12 PJB') untuk 12 kedai yang dibina atau bakal dibina. Silver Corridor mendakwa telah membayar RM1,440,000 kepada Gallant Acres, iaitu jumlah harga pembelian yang dinyatakan dalam 12 PJB tersebut. Walau bagaimanapun, pelikuidasi tidak menemui apa-apa keterangan mengenai bayaran yang dibuat. Gallant Acres memulakan suatu C tindakan di Mahkamah Tinggi untuk mengisytiharkan 12 PJB tidak sah, terbatal dan tiada kesan menurut s. 293 Akta Syarikat 1965 ('AS') yang dibaca bersama dengan ss. 52 dan/atau 53 Akta Kebankrapan 1967 ('AK'). Adalah dihujahkan bahawa 12 PJB tersebut adalah satu percubaan oleh pengarah Gallant Acres dan Silver Corridor terdahulu untuk, secara D penipuan, mengecualikan 12 kedai daripada dianggap sebagai sebahagian daripada aset Gallant Acres. Hakim Mahkamah Tinggi memutuskan memihak kepada Gallant Acres dan mengisytiharkan 12 PJB tidak sah. Oleh itu, rayuan ini. Pihak-pihak berkenaan mempertikaikan, antara lain, peruntukan untuk dibaca bersama dengan s. 293 AS. Silver Corridor menghujahkan bahawa s. 293 AS mesti dibaca bersama dengan s. 53 AK E manakala Gallant Acres dan Kepong Development menghujahkan bahawa s. 293 AS sepatutnya dibaca bersekali dengan s. 52 AK.

Diputuskan (menolak rayuan)
Oleh Varghese George HMR menyampaikan kehakiman mahkamah:

F **(1)** Dalam kes sebuah syarikat di bawah likuidasi, s. 293 AS perlu dibaca bersama dengan ss. 52 atau 53 AK untuk menentukan sama ada transaksi, pelupusan atau pembayaran tertentu yang melibatkan aset syarikat tidak sah atau boleh dibatalkan kerana ia 'undue preference' terhadap aset atau pemiutang-pemiutang syarikat berkenaan. Seksyen 52 G AK ialah peruntukan yang boleh digunakan apabila pembantahan berdasarkan alasan bahawa transaksi yang dipertikaikan tidak dilaksanakan *bona fide* dan/atau untuk balasan yang bernilai. Seksyen 53 AK hanya relevan dalam situasi apabila si bankrup (syarikat) telahpun muflis dan bantahan adalah untuk mentaksahkan pelupusan atau H pembayaran tertentu yang dibuat kepada beberapa pemiutang-pemiutang atau benefisiari-benefisiari, lebih dari pada yang lain atau badan am pemiutang-pemiutangnya.

(2) Dengan memohon untuk membaca s. 293 AS bersekali dengan s. 53 AK, Silver Corridor cuba mengehadkan istilah 'twilight period' kepada enam I bulan berbanding tempoh dua tahun sebelum penyampaian petisyen penggulung dibenarkan di bawah s. 52 AK. Ini satu pendekatan terdesak untuk mengelirukan isu-isu sebenar daripada mahkamah. Seksyen 53(1)

AK hanya relevan apabila mempertimbangkan sama ada pelupusan atau pembayaran yang dibuat memihak kepada 'creditor' telah dibantah untuk berada dalam keutamaan 'creditors' yang lain, yang akan berakhir dengan kebankrapan.

(3) Tiada ruang untuk mempertikaian apa yang diplidkan oleh Gallant Acres dan Kepong Development dalam tindakan ini dan apa yang telah dilaksanakan dengan sewajarnya pada perbicaraan itu bahawa transaksi yang dipertikaikan iaitu 12 PJB tidak dimeterai dengan niat baik dan mahupun ia disokong dengan balasan yang bernilai dari Silver Corridor kepada Gallant Acres. Ini nyata bermakna s. 52 AK adalah peruntukan material untuk digunakan untuk dibaca bersekali dengan s. 293 AS.

(4) Gallant Acres telah melepaskan beban pembuktian bahawa transaksi jual beli 12 kedai tidak dilaksanakan dengan niat baik dan/atau dengan balasan yang bernilai dan dengan itu tidak sah menurut s. 293 AS dibaca bersama dengan s. 52 AK. Tiada kekhilafan atau salah arah oleh hakim Mahkamah Tinggi bahawa terdapat asas niat menipu atau motif sebalik pelaksanaan 12 PJB.

(5) Tiada keterangan bahawa jumlah wang yang dikatakan sebanyak RM1,440,000 iaitu pertimbangan pembelian yang tertera di bawah 12 PJB telah sesungguhnya dibayar ke dalam akaun pembangunan rumah Gallant Acres yang betul. Pertanyaan soalan pelikuidasi mengenai kewujudan atau pengendaliaan apa-apa HDA yang ditujukan kepada pengarah Gallant Acres di pejabat pada masa material kekal tidak terjawab.

Case(s) referred to:
Korakyat Plantations Sdn Bhd v. Tan Siew Ee & Ors [2005] 2 CLJ 578 CA ***(refd)***
Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd [1998] 4 CLJ 557 FC ***(refd)***
Tee Siew Kai v. Affin Bank & Anor & Other Cases [2011] 1 LNS 18 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 52, 53(1)
Companies Act 1965, s. 293
Housing Development (Control and Licensing) Act 1966, s. 7A
Housing Development (Housing Development Account) Regulations 1991, r. 4

For the appellant - Ringo Low; M/s Ringo Low & Assocs
For the respondent - Amrit Pal Singh; M/s AI Nathan

[Editor's note: For the High Court judgment, please see Gallant Acres Sdn Bhd (In Liquidation) & Anor v. Silver Corridor Sdn Bhd [2013] 1 LNS 1173 (affirmed).]

Reported by Najib Tamby

A

JUDGMENT

Varghese George JCA:

[1] The High Court after a full trial in a suit brought by the respondents/plaintiffs had granted in their favour the following declarations:

B

(a) Satu deklarasi bahawa 12 Perjanjian-perjanjian Jual Beli masing-masing ditarikhkan 19.9.2006 yang dirupakan dimasuki antara Plaintif Pertama, Plaintif Ke-2 dan Defendan berkenaan dengan 12 kedai iaitu Unit Nos A-G-1, A-G-2, A-G-3, A-G-4, A-G-5, A-G-6, B-G-1, B-G-2, B-G-3, B-G-4, B-G-5 dan B-G-6 semuanya didirikan atau akan didirikan atas Geran No. 47407 Lot No. 58072 Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan adalah tidak sah, terbatal dan tidak berkesan menurut seksyen 293 Akta Syarikat 1965 dibaca bersama dengan seksyen 52 dan/atau 53 Akta Kebangkrapan 1967;

C

(b) Satu deklarasi bahawa 12 kedai iaitu Unit Nos A-G-1, A-G-2, A-G-3, A-G-4, A-G-5, A-G-6, B-G-1, B-G-2, B-G-3, B-G-4, B-G-5 dan B-G-6 semuanya didirikan atau akan didirikan atas Geran No. 47407 Lot No. 58072 Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan adalah terletak hak dalam Pelikuidasi Plaintif Pertama menurut Perjanjian Usahasama bertarikh 30.12.1999 dan/atau seksyen 233 Akta Syarikat 1965;

D

E

[2] On 31 March 2014 we dismissed the appellant/defendant's appeal against that decision. We now set out our reasons for affirming the orders of the High Court.

[3] The first respondent/plaintiff (hereinafter referred as "Gallant Acres") was a developer. The second respondent/plaintiff (hereinafter referred as "Kepong Development") was the registered owner of land originally held under H.S.(D)79275, PT No: 564, Mukim Batu, Daerah Kuala Lumpur but subsequently subdivided into:

F

(a) Geran No. 47407 Lot No: 58072; and

G

(b) Geran No. 47408 Lot No: 58073,

(collectively referred as "the land").

[4] By a joint venture agreement dated 30 December 1999 (the JVA) between Kepong Development and Gallant Acres, the parties agreed to develop the land which was to be undertaken by Gallant Acres under two (2) phases. The first phase development was to be in respect of the subdivided Lot No. 58072, whilst Lot No. 58073 was to be later developed under the second phase.

H

[5] Gallant Acres was wound-up by an order of court on 5 March 2008; the winding-up petition by one South Engineers Sdn Bhd had been presented on 18 December 2007. One Subramanian a/l A V Sanker (PW2 at the trial) was appointed as the liquidator of Gallant Acres.

I

[6] It is pertinent to also take note that prior to Gallant Acres being wound-up, Gallant Acres had brought two proceedings against Kepong Development, as enumerated below, wherein judgments had however been entered in favour of Kepong Development.

(a) In Kuala Lumpur High Court Saman Pemula No. D8-24-153-2003, Kepong Development (the defendant there) had obtained judgment against Gallant Acres on 24 April 2004 for a sum of RM1,000,000 with interest; Gallant Acres's appeal to the Court of Appeal was dismissed on 26 September 2006 and the attempt to obtain leave to take it further to Federal Court was dismissed in April 2007.

(b) In Kuala Lumpur High Court Guaman Sivil No. S6-22-682-2007, Kepong Development had on 29 February 2008 entered a summary judgment (on their counterclaim) against Gallant Acres for the sum of RM3,523,500.

[7] During the course of the verification exercise undertaken by the liquidator of Gallant Acres, the appellant/defendant (hereinafter referred as "Silver Corridor") produced 12 sale and purchase agreements in respect of 12 shops constructed or to be constructed in Phase 1, all of which were dated 19 September 2006 (hereinafter referred as "the 12 SPAs"). The terms of the 12 SPAs were identical in all aspects save as to the description of the respective parcels. Silver Corridor claimed that it had paid Gallant Acres the purchase price as set out in the 12 SPAs at RM120,000 for each shop totalling a sum of RM1,440,000.

[8] The signatories to the 12 SPAs were Gallant Acres (the developer) and Kepong Development (the landowner) on the one part, and the Silver Corridor on the other part.

[9] The liquidator of Gallant Acres was however upon further investigation not able to find any evidence in the records of the company that the alleged payments towards the purchase consideration in respect of the 12 shops had indeed been received by Gallants Acres into their accounts. Further information and relevant documentation were sought from Silver Corridor but none was forthcoming.

[10] The liquidator of Gallant Acres proceeded to appoint independent real estate valuers to undertake a valuation of the 12 shops as at 19 September 2006, and the opinion obtained indicated that the market value as at that date of the alleged transaction to be RM2,040,000 or thereabouts.

[11] By this action commenced in July 2012 Gallant Acres (acting by the liquidator), and Kepong Development sought that the 12 SPAs be declared invalid, void and of no effect pursuant to s. 293 of the Companies Act 1965 (CA) read together with ss. 52 and/or 53 of the Bankruptcy Act 1967 (BA). A further declaration that the 12 shops were still vested with the liquidator of Gallant Acres was also prayed for in the suit.

[12] It was contended that the impugned 12 SPAs were an attempt by the then directors of Gallant Acres and also the directors of Silver Corridor to fraudulently exclude the 12 shops from being considered as part of the assets of Gallant Acres considering that the liquidation of Gallant Acres was eminent (bearing in mind that there was already a judgement entered against Gallant Acres in favour of Kepong Development at that point in time). It was further alleged that the 12 SPAs were for all intents and purpose a sham and in any event constituted an unlawful conveyance to defeat Gallant Acres's lawful creditors.

[13] A principal aspect of the allegations of Gallant Acres and Kepong Development centred around the actions and role of one Lee Aik Cheong (an undischarged bankrupt) in this episode and that he effectively had control of both Gallant Acres and Silver Corridor through his relatives at the material times. The directors (and/or shareholders) of Gallant Acres and Silver Corridor at the material time (19 September 2006) were Lee Aik Cheong's immediate relatives, namely either his wife, son, sibling or an uncle. Accordingly it was contended that the intent behind the purported disposal of Gallant Acres's assets was tainted and did not amount to a genuine commercial transaction at all.

[14] Prior to this suit being instituted, the liquidator of Gallant Acres, desirous of salvaging the development project on the land, had entered into a settlement agreement on 5 April 2011 with Kepong Development whereby it was agreed that Kepong Development would now redevelop the land at Kepong Development's own expense, subject to the requisite sanction being obtained by the liquidator from the court to satisfactorily resolve and settle all claims made by prior purchasers of flats and shops in Phase 1 and the medium-cost apartments in Phase 2.

Trial

[15] Two witnesses testified for Gallant Acres and Kepong Development. PW1 was a director of Kepong Development while PW2 was the liquidator of Gallant Acres. Silver Corridor only called one witness, namely DW1, their statutory company secretary. Neither Lee Aik Cheong, nor any of the directors of either Gallant Acres or of Silver Corridor at the various points of time in question, were called by Silver Corridor to testify.

Decision Of The High Court

[16] After analysing the law as laid out by s. 293 of the CA and ss. 52 and 53 of the BA, the learned trial judge in Her Ladyship's grounds of judgment elaborated and stated as follows:

The issue to be determined in the instant case is whether the sale and purchase of the 12 shop lots done *(sic)* in the course of normal genuine commercial transaction. The sale and purchase price for each shop lots was RM120,000.00 and the total value of the said shop lots were RM1,440,000.00. The SPA was executed 3 months before the winding-up. The 12 SPAs were all entered and executed on the same date that is, 19.9.2006. The signatories to the SPAs were all related to each other. For the 1st Plaintiff the SPAs were signed by one Lee Tiam Lai and for the Defendant one Kok Siew Hwa. Mr Wong Boon Just signed on behalf of the 2nd Plaintiff. Madam Kok Siew Hwa happens to be Lee Aik Chong's wife. The purchase sum were all paid to the 1st Plaintiff *vide* 12 cheques and each cheque was for the sum of RM120,000.00. Lee Tiam Lai who signed the cheques on behalf of the 1st Plaintiff is the brother of Lee Aik Chong's father. PW1 gave evidence that the Lee family was involved in both the 1st Plaintiff as well as the Defendant as shareholders and directors in 2006. This was fact was not challenged or rebutted by the Defendant.

In a normal sale and purchase transaction the purchaser would only pay a 10% deposit. In this case the Defendant paid the full purchase price within 24 days upon the execution of the sale and purchase agreements.

The 12 shop lots were only 45% completed at the material time when the SPAs were executed. I am of the considered view that the sale and purchase transaction of the 12 shop lots were clearly not made in the course of a normal, genuine commercial transaction. The Defendant must prove that the transaction was entered in good faith. The Defendant only called 1 Tan Si Li (DW1), who is the Company Secretary. DW1 only referred to bank statements and the cheques as proof of payments. She only confirmed that all the cheques issued were cleared for payments.

From the fact the shareholders and directors of the [1st and 2nd Plaintiff] *(sic)* had family ties and are closely related. None of the directors of the Defendant were called as witnesses to give evidence. The Defendant failed in its attempts to prove that the Defendant was a purchaser in good faith. Therefore based on the evidence the Defendant failed to show to this Court that the transactions were genuine commercial transaction.

PW2 gave evidence that the 1st Plaintiffs accounts in Public Bank and Hong Leong were all closed pursuant to a directors resolution dated 14.12.2007. As a housing developer the 1st Plaintiff is required to open a Housing Developers Account (HDA account). Unfortunately from the investigation conducted by PW2 the HDA account could not be traced. An HDA account cannot be closed until the certificate if *(sic)* fitness is issued. All the monies collected for the sale of the properties for Phase 1 must be paid into the HDA account. The Liquidators had even written to the Bank Negara to enquire of the said account. The directors and shareholders according to the Liquidator were not cooperative. PW2 gave evidence that he gather information from all relevant parties to ascertain the status of the 1st Plaintiff and the Phase 1 development. The Liquidator had taken steps to communicate with the directors of the 1st

Plaintiff informing them of his appointment as well as requesting them to submit a statement pursuant to section 188(1)(b) CA. He even sent registered letter to the directors of the 1st Plaintiff, Lee Tiam Lai and Ng Lan Hing but did not received any response.

The main cause of action is to the validity of the Agreements. I am of the considered view that based on the facts and evidence these 12 Agreements are absolutely void against the Liquidator. Therefore the 12 SPAs are deemed to have given the Defendant preference over other Creditors.

Before Us

[17] Counsel for Silver Corridor's submissions before us were in summary as follows:

(a) Gallant Acres and Kepong Development had not sufficiently discharged the burden on them to nullify the 12 SPAs; as the allegations essentially were based on fraud, the standard of proof required to be met was "beyond reasonable doubt" and not "balance of probabilities" as had appeared to have been applied by the learned trial judge.

(b) The liquidator of Gallant Acres had been instigated by Kepong Development to institute these proceedings and had in any event failed to show that this action was being brought for the benefit or on behalf of the general body of creditors of Gallant Acres.

(c) Kepong Development was estopped from challenging the 12 SPAs as Kepong Development itself was a signatory/party to those SPAs; similarly, Kepong Development could not also rightfully raise any complaint as to the adequacy of the stated purchase consideration in those impugned documents.

[18] It was also contended for Silver Corridor that the lump sum payment of the whole of the purchase price effected within a few days of execution of the 12 SPAs ought to be considered as being advantageous and of assistance to Gallant Acres in any case.

[19] Counsel for Gallant Acres and Kepong Development on the other hand urged upon the court that there was no satisfactory reasons shown for any appellate intervention in this case. The learned trial judge, it was submitted, had applied the correct principles of law in holding that on the evidence there has been undue or fraudulent preference under s. 293 of the CA established to allow the action of Gallant Acres and Kepong Development.

[20] It was stressed by counsel for Gallant Acres and Kepong Development that notwithstanding that Silver Corridor having adduced documentary proof of cheques made out in favour of Gallant Acres (amounting to a total of RM1,440,000), there was no evidence that those sums had as a matter of fact

being credited into the housing development account (HDA Account) of Gallant Acres. It was submitted that pursuant to s. 7A of the Housing Development (Control and Licensing) Act 1966, regulated further by r. 4 of the Housing Development (Housing Development Account) Regulations 1991, every developer was statutorily required to open and maintain a HDA account. The liquidator could not find that such a HDA had been maintained in this case and the directors of Gallant Acres also had not come forward to explain this lapse either.

Our Deliberations And Decision

The Law

[21] We set out firstly, the three principal statutory provisions around which the submissions of the respective parties revolved, namely s. 293 of the CA, s. 52 of the BA and s. 53 of the BA. Section 293 of the CA was as follows:

293. Undue Preference

(1) Any transfer, mortgage, delivery of goods, payments, execution or other act relating to property made or done by or against a Company which, had it been made or done by or against an individual, would in his bankruptcy under the law or bankruptcy be void or voidable shall in the event of the Company been wound up be void or voidable in like manner.

(2) For the purposes of this section a date which corresponds to the date of presentation of the bankruptcy petition in the case of an individual shall be:

(a) In the case of a Winding-Up by the court:

(i) The date of the presentation of the petition; or

(ii) Where before the presentation of the petition a resolution has been passed by the company for voluntary Winding-Up the date in which the resolution to wind up the Company voluntarily, is passed, whichever is earlier; and

(b) In the case of a voluntary winding-up the date on which the winding-up is deemed by this Act to have commenced.

(3) Any transfer or assignment by a company of all its property to trustees of the benefit of all its creditors shall be void.

Section 52 of the BA was in the following terms:

52. Avoidance of voluntary settlement.

(1) Any settlement of property, **not being** a settlement made before and in consideration of marriage or **a settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration**, or a settlement made on or for the wife or children

of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Director General of Insolvency, and **shall, if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement, be void against the Director General of Insolvency**, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2) Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt, before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the Director General of Insolvency.

(3) **For the purposes of this section "settlement" includes any conveyance or transfer of property**, bill, bond, note, security for money or covenant for the payment of money and any gift of money.

(4) For the purposes of this section a settlor who dies insolvent shall be deemed to have become bankrupt at the date of his death.

Section 53 of the BA read as follows:

53. Avoidance of preferences in certain cases

(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered **any person unable to pay his debts, as they become due**, from his own money in favour of any Creditor or any person in trust for any Creditor shall be deemed to have given such creditor a preference over other Creditors if the person making, taking, paying or suffering the same is **adjudged bankrupt** on a bankruptcy petition presented **within six months after the date** of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the official assignee.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a Creditor of the bankrupt.

(3) For the purposes of this section "creditor" includes a surety or Guarantor for the debt due to the Creditor.

(emphasis added)

[22] It was trite that in the case of a company under liquidation, s. 293 of the CA had to be read either with s. 52 or s. 53 of the BA to determine whether certain transactions, disposals or payments involving the assets of the company were void or voidable for reason that it constituted an "undue preference" as against the assets or creditors of the company concerned. It was counsel for Silver Corridor contention that in the context of the facts of this case, s. 293 of the CA had to be read with s. 53 of the BA. Counsel's specific emphasis relying on s. 53 of the BA was that a conveyance or transfer sought to be impugned for reason that it was an undue preference had accordingly to be one transacted within a period of six months prior to the date of the presentation of the winding-up petition. It was argued that since there had been a lapse of more than six months between the dates the 12 SPAs were entered into (19 September 2006) and Gallant Acres being wound up (deemed to be the date of the presentation of the winding-up petition on 18 December 2007), the attempt to nullify the 12 SPAs by the liquidator of Gallant Acres was wholly misconceived and ill-founded in law.

[23] The contention of counsel for the Gallant Acres and Kepong Development on the other hand was that s. 293 of the CA ought to be read with s. 52 of the BA to determine the validity or otherwise of the impugned 12 SPAs. The bone of contention of Gallant Acres and Kepong Development was that the "settlement" (which by definition in s. 52(3) of the BA included conveyance or transfer of property) of the shops by virtue of the 12 SPAs was not made in good faith or for valuable consideration and in that circumstance, they were absolutely void if the disputed transaction(s) was entered into within a period of two years prior to Gallant Acres being wound-up; here there was only a gap of about one year and three months between those two material dates and this fell well within the proscribed period.

[24] Upon perusal of the pleadings and records we were satisfied that the thrust of the case of the liquidator for Gallant Acres and Kepong Development, both at the High Court and before us, has always been that the sale and purchase transactions with respect to the 12 shops were not been entered into *bona fide* and, in any event, that Silver Corridor had not established that they had paid valuable consideration for the same. This, firstly, was could clearly borne out by what was pleaded by Gallant Acres and Kepong Development in their statement of claim, in particular paras. 17, 23, 24 (iv), (vii), (viii), (xix) to (xxxiv) thereof. Furthermore, the case for Gallant Acres and Kepong Development had all along been pursued on that premise, namely, that the transactions were devoid of valuable consideration and the execution of the 12SPAs were tainted by the conflicted interest of related personages behind Silver Corridor and the directors of Gallant Acres at the time it was entered into.

A **[25]** In our reading of the grounds of judgment, the learned trial judge appeared not to have delved into the differences between ss. 52 and 53 of the BA nor did it appear that the court below had been indeed called to consider that point. Her Ladyship had approached the issue before the court under the broad head of whether there had arisen a situation of undue preference (or
B fraudulent preference as Her Ladyship termed it). Nevertheless it is noteworthy that the court correctly addressed the question for determination which was couched as follows:

> ... whether the sale and purchase of the 12 shop lots (were) done in the course of normal or genuine commercial transaction.

C On a closer reading of the grounds of judgment, it was also obvious to us that the learned trial judge had analysed the evidence led before the court and had properly held that Solid Corridor had:

> ... failed in its attempts to prove that the Defendant was a purchaser in good faith …

D and, further that there was no evidence that the purported purchase consideration had in fact been credited to an HDA account as required by law. This was all well within the four corners of the pleaded case of Gallant Acres and Kepong Development.

E **[26]** By seeking to read s. 293 of the CA with s. 53 of the BA only, counsel for Silver Corridor was attempting to restrict the so termed "twilight period" to six months as opposed to a period of two years prior to the presentation of the winding-up petition allowed under s. 52 of the BA. This, in our view, was a desperate stance to confuse the real issues that was before the court.

F **[27]** There was no room for dispute that what had been pleaded by Gallant Acres (through the liquidator) and Kepong Development in this action and which had been accordingly pursued at the trial was that the disputed transactions, namely the 12 SPAs had not been entered in good faith and nor were they supported by valuable consideration passing from Silver Corridor
G to Gallant Acres. This obviously meant that s. 52 of the BA was the material provision to be invoked to be read with s. 293 of the CA. It followed then that the transactions that could be called into question were those entered within two years prior to 18 December 2007.

[28] *Korakyat Plantations Sdn Bhd v. Tan Siew Ee & Ors* [2005] 2 CLJ 578
H was one case which dealt with s. 293 of the CA read together with s. 52 of the BA. The Court of Appeal in affirming the decision of the High Court held that on the facts there, the "disputed purchasers" had given valuable consideration for the impugned transactions, *albeit*, a total set-off against loans repayable by the company under liquidation to them, in exchange for

I

the property. Similarly, as in the instant case, a liquidator was in that case attempting to exclude certain "disputed" sale and purchase agreements. It was stated there too that the burden of proof as required by s. 52 of the BA rested with the liquidator and in that case it had not been proved that the sale and purchase transactions were not done in good faith.

[29] For completeness it must also be stated that s. 53(1) of the BA was only relevant when considering whether disposals or payments made in favour of a "creditor" were being challenged to be in preference to other "creditors", that is in the run-up to a bankruptcy (and in the case of companies, to the winding-up). The critical words in that provision to be noted was, when "... unable to pay its debt as they become due ..." meaning that the disputed disposal of asset or payment took place or occurred at a time when the company was insolvent. (See *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557. FC (Federal Court) and the third condition of the five conditions to be satisfied in such a situation, to nullify such acts of preference).

[30] To restate the distinction was this: Section 52 of the BA was the applicable provision when the challenge was premised on the grounds that the disputed transaction was not entered *bona fide* and/or for valuable consideration. Section 53 of the BA would only be relevant in a situation where the bankrupt (company) was already insolvent (unable to pay its debts) and the challenge was to invalidate certain disposals or payments effected to some creditors or beneficiaries, in preference to others or the general body of creditors.

[31] It is also instructive to note that, Mohamad Ariff J (as he then was) in the case of *Tee Siew Kai v. Affin Bank & Anor & Other Cases* [2011] 1 LNS 18, where s. 293 of the CA and s. 53 of the BA featured for consideration of the court, had this to say as regards the objective underlying s. 293 of the CA:

> Section 293 of the Companies Act read in conjunction with Section 53 of the Bankruptcy Act, to my mind, cannot be construed in a mechanistic manner, but must be read in its proper context, which is to invalidate attempts at "fraudulent preference". It should not be a mere matter of counting the dates and determining the "twilight period", and indulge in mere legal semantics with an indifferent regard to commercial reality and banking practices. It surely cannot be good law for a legal conclusion to be made dependent on the vagaries of dates merely. On the facts of this dispute, had the Supplemental Agreements and the Debentures been dated a few days earlier, they would as a simple matter of arithmetic be outside the "twilight period"... The answer must surely lie with the question whether these have been created or made in the course of a normal, genuine commercial transaction. If so, there cannot be any issue of "fraudulent preference". Section 293 merely creates a rebuttable

presumption of fraudulent preference where a charge, for example, is made within the six months from the date of presentation for the Winding-Up Petition, and it bears reiteration that all five necessary ingredients as established in Sime Diamond must be satisfied.

Evidence

[32] The rest of the submissions of Silver Corridor before us was directed against the evidence and the finding of facts by the trial court. We found no reason to differ from the conclusions of the learned trial judge as they were supported by and was consistent with the totality of the evidence adduced. We found, as elaborated below, that the liquidator of Gallant Acres had in this case discharged the burden to prove that the sale and purchase transactions in respect of the 12 shops were not undertaken in good faith and/or for valuable consideration and was therefore void pursuant to s. 293 of the CA read with s. 52 of the BA.

[33] The conclusion of the court that the 12 SPAs were hastily drawn up at the behest of Lee Aik Cheong with the involvement of one or more of his relatives was premised on undisputed facts. Neither Lee Aik Cheong or any the director of Silver Corridor had come forward to rebut the evidence adduced by the liquidator of Gallant Acres (PW2) and PW1 for Kepong Development that behind the *facade* of the corporate veneer, the "parties" were indeed related to each other. We found no error or misdirection by the learned trial judge on the inferences reached in that regard that there existed an underlying deceitful intent or motive behind the execution of the 12 SPAs.

[34] There was also no evidence that the purported sum of RM1,440,000 being the stated purchase consideration under the 12 SPAs had indeed been paid into a proper HDA of Gallant Acres. The enquiries by the liquidator as to the existence or operation of such a HDA directed to the directors of Gallant Acres in offices at the material times, remained unanswered.

[35] Coupled to this was the testimony of DW1 that the debits of the alleged payments by Silver Corridor from their Maybank account had been to a Hong Leong bank account of Gallant Acres. Interestingly, this witness also confirmed that this bank account had been closed by the directors of Gallant Acres (by the Board Resolution of 14 December 2007) just prior to the order of winding-up on 5 March 2008 (on a petition, it would be recalled, that had been presented on 18 December 2007). There was no explanation forthcoming as to what happened to those monies in the Hong Leong bank account.

[36] As stated above the directors of Silver Corridor (wife and son of Lee Aik Cheong) were related to the directors of Gallant Acres (brothers and uncle of Lee Aik Cheong). It was inconceivable that the Directors of Silver Corridor did not see it fit or necessary to introduce evidence to show that the alleged payments of the purchase consideration for the 12 SPAs had

indeed been effected, if not into the HDA, then at least for the benefit of Gallant Acres, if at all that was the case. This was definitely something within the ability of the directors of Silver Corridor to do so but no such effort had been taken to that end.

[37] It was Silver Corridor's claim that 100% of the total purchase consideration for the 12 shop lots purportedly purchased had been effected within twenty four days of the execution of the 12 SPAs (the MBB cheques dated 13 October 2006 were debited from Silver Corridor's bank account on 16 October 2006). This claim had to be considered against the undisputed facts that:

(i) by the terms of the SPAs, the purchase consideration were only required to have been settled progressively upon completion of the various stages of physical construction of the shops, that is, in any case over a period of 36 months; and

(ii) the construction of the shop lots in question were, in any event, only 45% completed on or about 19 September 2006.

[38] There was no reasonably acceptable basis for the alleged payments to be hurriedly effected, as was being claimed here. The attempt of counsel for Silver Corridor to justify the same by stating that it was "advantageous" to Gallant Acres and should be viewed as such was, in our view, a very feeble one without any evidence that such accelerated payment was actually requested for by Gallant Acres to assist the company.

[39] It is pertinent to also point out here that the 12 SPAs were executed on 19 September 2006, less than ten days before the Court of Appeal on 26 September 2006 dismissed the Gallant Acres appeal against the judgment of 24 April 2004 in favour of Kepong Development. However more significantly, the MBB cheques claimed to have been issued towards the settlement of the full purchase price were all dated 13 October 2006 and debited from Silver Corridor's bank account, as it would appear on 16 October 2006, that is, subsequent to the dismissal by the Court of Appeal of Gallant Acres's said appeal.

[40] With respect to the "estoppel" argument raised against Kepong Development, namely, that by being a co-signatory to the 12 SPAs, Kepong Development was a willing and consenting party to the 12 SPAs, we note that PW1 was cross-examined on this issue. The answer given by PW1 was that Kepong Development as per the terms of the joint venture agreement (between Gallant Acres and Kepong Development) had no choice but to co-sign the same at that material time. This was accepted by the learned trial judge. In any event, what was in issue before the trial court and us, was whether Silver Corridor had on evidence countered the position taken by the liquidator of Gallant Acres that the sale and purchase transactions in respect of the 12 shops was not entered *bona fide* and/or for valuable consideration.

A **[41]** The evidence in this case was overwhelmingly against Silver Corridor and/or the validity of the alleged transactions. Independent of any aspersions cast on Kepong Development, the liquidator of Gallant Acres had a statutory right under s. 293 of the CA to exclude dubious transactions (for undue preference) in the course of conducting the liquidation process. This was not
B an action founded on "fraud". What was being pursued by the liquidator was a civil remedy which was statutorily provided to the liquidator of Gallant Acres in the carrying out of his functions.

[42] Finally, we were also satisfied that the liquidator of Gallant Acres had brought this suit for the benefit of the general body of creditors and therefore
C had sufficient authority or locus to pursue this action together with Kepong Development. The settlement agreement entered into on 5 April 2011 as between them, *inter alia* contemplated a scheme of compromise with purchasers of the low cost flats and Phase 1 shops to "... waive all late delivery claims and to continue to pay the balance of purchase price" and
D with purchasers of the Phase 2 medium cost apartments to "… terminate their (SPAs) and refund the monies paid". This instant action by the liquidator (to weed out sham transactions laying false claims on the assets of Gallant Acres), was without question a necessary proceeding brought for the benefit of the general body of creditors of Gallant Acres, which included
E only genuine purchasers of the abandoned development project ultimately.

Conclusion

[43] For the reasons discussed above, we unanimously found no reasons to overturn the decision of the learned trial judge, either in law or on the facts.

F

G

H

I